85-823

No.....

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

STATE OF GEORGIA, BY ITS DEPARTMENT OF MEDICAL ASSISTANCE,

Petitioner,

v.

MARGARET M. HECKLER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. JOY
Senior Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

PLEASE ADDRESS ALL COMMUNCATIONS TO:

WILLIAM C. JOY
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3336

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Whether the Secretary of the Department of Health and Human Services is required to provide federal financial participation to the State of Georgia for expenditures made for abortion services provided after the enactment of the Hyde Amendment pursuant to a federal court order interpreting Title XIX of the Social Security Act as requiring provision of abortion services as a part of the State Medicaid program.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

STAEUTES AND REGULATIONS 3

STATEMENT OF THE CASE

I. Course Of Proceedings And Disposition Of The Case Below 3

II. The Medicaid Program 5

III. The Hyde Amendment And The Georgia Experience 6

REASONS FOR GRANTING THE WRIT 9

I. The Secretary Of Health And Human Services Is Obligated To Pay Federal Financial Participation For State Expenditures Made Pursuant To Title XIX Of The Social Security Act. 10

II. The Hyde Amendment Does Not Prohibit The Secretary's Payment Of FFP For State Funds Expended Under Title XIX. 13

CONCLUSION 15

Appendix A ..... App. 1

Appendix B ..... App. 14

Appendix C ..... App. 24

Appendix D ..... App. 30

TABLE OF AUTHORITIES

Pages

CASES:

Beal v. Doe, 432 U.S. 438 (1977) 5

Commonwealth of Massachusetts v. Heckler, No. 82-1192-N (D. Mass. Feb. 28, 1985) 13

Commonwealth of Pennsylvania v. Department of Health and Human Services, 723 F.2d 1114 (3d Cir. 1984) 14

Doe v. Busbee, 471 F.Supp. 1326 (N.D. Ga. 1979) 7

Doe v. Busbee, 481 F.Supp. 46 (N.D. Ga. 1979) 7, 8, 12

Harris v. McRae, 448 U.S. 297 (1980) 5, 8, 9, 11, 12, 13, 14

McRae v. Califano, 491 F.Supp. 630 (E.D. N.Y. 1980) 4

Morton v. Mancari, 417 U.S. 535 (1974) 14

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) 11

State of Georgia v. Heckler, 768 F.2d 1293 (11th Cir. 1985) 2, 5

State of Georgia v. Heckler, No. C83-594A (N.D. Ga. April 6, 1984) 2, 5

State of Illinois v. United States Department of Health and Human Services, 772 F.2d 329 (1985) 13

Watt v. Alaska, 451 U.S. 259 (1981) 14

Williams v. Zbaraz, 448 U.S. 358 (1980) 8, 9

Women's Health Services, Inc. v. Maher, 514 F.Supp. 265 (D. Conn. 1981) 13

STATUTES:

5 U.S.C. §§ 702-706 4

28 U.S.C. §§ 1381, 1361, 2201 and 2202 4

28 U.S.C. § 2101(c) 2

TABLE OF AUTHORITIES—Continued

	Pages
42 U.S.C. § 1396, *et seq.*	3, 4, 5
42 U.S.C. § 1396a(b)	5
42 U.S.C. § 1396b(a)	3, 5, 10
42 U.S.C. § 1396b(d)(2)	6
Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976)	3, 6
Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977)	3, 6
Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978)	3, 6
Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979)	3, 6
Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979)	3, 6
Pub. L. No. 96-368, 94 Stat. 1301, 1356 (1980)	3
Pub. L. No. 96-369, § 110, 94 Stat. 1356 (1980)	6, 14
Pub. L. No. 96-536, § 109, 94 Stat. 3170 (1981)	6, 14
Pub. L. No. 97-12, § 402, 95 Stat. 95 (1981)	3, 6
Pub. L. No. 97-109, 95 Stat. 95 (1981)	14
Pub. L. No. 97-377, § 204, 96 Stat. 1894 (1982)	6
Pub. L. No. 98-139, § 204, 97 Stat. 887 (1983)	6
Pub. L. No. 98-619, § 204, 98 Stat. 3321 (1984)	6

REGULATIONS:

42 C.F.R. § 231.250	3, 12
45 C.F.R. § 205.10(b) (October 1, 1979)	3, 12
45 C.F.R. § 16.1, *et seq.*	9
44 Fed. Reg. 17926 (March 23, 1979)	12
45 Fed. Reg. 24878 (April 11, 1980)	12

No.....

In The

Supreme Court of the United States

October Term, 1985

STATE OF GEORGIA, BY ITS DEPARTMENT OF MEDICAL ASSISTANCE,

Petitioner,

v.

MARGARET M. HECKLER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,[1]

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The State of Georgia, by its Department of Medical Assistance, the petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on August 16, 1985.

---

[1]Other defendants in this action include Carolyn K. Davis, Administrator of the Health Care Financing Administration (HCFA); George R. Holland, Regional Administrator of HCFA; Norval D. Settle, Cecilia Sparks Ford and Donald F. Garrett, members of the Departmental Grant Appeals Board; and the Department of Health and Human Services. Secretary Margaret Heckler has resigned and her successor, when named, will be added as a party. For the purposes of this petition, the phrase "the Secretary" refers to the position, the Secretary of Health and Human Services, rather than the person holding that position.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported in *State of Georgia v. Heckler,* 768 F.2d 1293 (11th Cir. 1985). (Appendix A). The Opinion of the district court in *State of Georgia v. Heckler,* No. C83-594A (N.D. Ga. April 6, 1984), was entered on April 6, 1984. (Appendix B). The decision of the Departmental Grant Appeals Board of the Department of Health and Human Services in Georgia Department of Medical Assistance, Decision No. 375 (Jan. 25, 1983) was rendered on January 25, 1983. (Appendix C).

JURISDICTIONAL STATEMENT

The State of Georgia, acting by and through its Department of Medical Assistance (DMA) petitions this Court for certiorari to review an adverse decision of the United States Court of Appeals for the Eleventh Circuit issued and entered on August 16, 1985 in *State of Georgia v. Heckler,* 768 F.2d 1293 (11th Cir. 1985). This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 2101(c) since this is a petition for certiorari intended to bring a judgment of a federal court of appeals in a civil action before the United States Supreme Court for review and this petition has been timely filed within the allowable ninety days.

STATUTES AND REGULATIONS

The following statutes and regulations, which this case involves, are set out in Appendix D to this petition:

42 U.S.C. § 1396 (1983);

42 U.S.C. § 1396b(a);

Portions of Pub. L. No. 94-439, 90 Stat. 1418, 1429, 1434 (1976);

Portions of Pub. L. No. 95-205, 91 Stat. 1459 (1977);

Portions of Pub. L. No. 95-480, 95 Stat. 1567, 1576, 1586 (1978);

Portions of Pub. L. No. 96-86, 93 Stat. 656, 659, 662 (1979);

Portions of Pub. L. No. 96-123, 93 Stat. 923, 925, 926 (1979);

Portions of Pub. L. No. 96-369, 94 Stat. 1351, 1356 (1980);

Portions of Pub. L. No. 97-12, 95 Stat. 95, 96 (1981);

42 C.F.R. § 231.250;

45 C.F.R. § 205.10(b) (October 1, 1979).

STATEMENT OF THE CASE

I. Course Of Proceedings And Disposition Of The Case Below

The State of Georgia, by and through its Department of Medical Assistance (DMA) brought suit in the United States District Court for the Northern District of Georgia seeking declaratory and injunctive relief enjoining the Secretary of Health and Human Services and the Administrator of the Health Care Financing Administration (HCFA) from failing or refusing to reimburse the State of Georgia and its Department of Medical Assistance for the federal share (federal financial participation or FFP) of

the funds expended for abortion services during the time the State was required by federal district court order to provide those services as a part of its program under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* The State also sought judicial review of the decision of the Department of Health and Human Services (HHS) disallowing the cost of these services from federal financial participation. The State contends that it was entitled to $167,392 in FFP for monies expended, as required by federal court order, from December 7, 1979 to February 18, 1980 and from September 30, 1980 to March 31, 1982[2] to reimburse Medicaid providers for "medically necessary" abortion services.

Prior to Petitioner's filing the district court suit, the Health Care Financing Administration disallowed FFP for the periods in question, and DMA appealed that decision to the Departmental Grant Appeals Board. The Board issued a final decision disallowing the FFP and holding that the Hyde Amendment precluded the expenditure of any federal monies for Medicaid abortion services in excess of the restrictions contained therein. Georgia Department of Medical Assistance, Decision No. 375 (January 25, 1983) (Appendix C).

After the Board ruled, the State instituted this action and the matter was submitted on cross-motions for summary judgment to the district court for decision. Jurisdiction for that action was based upon 28 U.S.C. §§ 1381, 1361, 2201 and 2202. Judicial review of the Board's decision was authorized by 5 U.S.C. §§ 702-706.

On April 6, 1984 the district court issued an order reversing the disallowance and remanding the case to the

---

[2]During the intervening period HHS provided FFP for abortion services under an injunction requiring it to do so. *McRae v. Califano*, 491 F.Supp. 630 (E.D. N.Y. 1980).

Secretary for action consistent with its opinion. *State of Georgia v. Heckler*, No. C83-594A, slip. op. at 12 (N.D. Ga. April 6, 1984) (Appendix B). Secretary Heckler appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit which reversed the district court decision. *State of Georgia v. Heckler*, 768 F.2d 1293 (11th Cir. 1985). It is this judgment that the State petitions this Court to review.

II. The Medicaid Program

The Medicaid program, embodied in Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq.*, establishes a cooperative federal-state program for the purpose of providing medical services to needy individuals who meet eligibility criteria. *See* 42 U.S.C. § 1396, *et seq.* *See also Harris v. McRae*, 448 U.S. 297 (1980). Under Title XIX, each state, which chooses to participate in the medical assistance program (Medicaid), must designate a "single state agency" to administer the program. The State agency develops a medical assistance plan, consistent with applicable federal law and regulations, and submits it to HHS for approval. Upon approval of the State plan, the State becomes eligible for reimbursement of a *portion of its expenditures* made in providing required and optional services to recipients under the plan. *See* 42 U.S.C. § 1396 b (a). The State plan describes the nature and scope of the State's program and provides assurance that the state will administer the program in conformity with federal law and regulations. 42 U.S.C. § 1396a(b). *See generally, Beal v. Doe*, 432 U.S. 438, 441 (1977). Payments to the states are made in the form of quarterly grants based on estimated expenditures for the medical assistance program during the following quarter, subject to adjustments reflecting the reconciliation of prior grants with actual re-

ported expenditures. 42 U.S.C. § 1396b(d) (2). Medical assistance is provided by reimbursing providers (doctors, hospitals, etc.) for services provided to eligible individuals.

III. The Hyde Amendment And The Georgia Experience

Beginning in 1976, the United States Congress, through a series of amendments to appropriations bills or joint resolutions, passed what has become generally known as the Hyde Amendment. *See* Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976); Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978); Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979); Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979); Pub. L. No. 96-369, § 110, 94 Stat. 1356 (1980); Pub. L. No. 96-536, § 109, 94 Stat. 3170 (1980); Pub. L. No. 97-12, § 402, 95 Stat. 96 (1981); Pub. L. No. 97-377, § 204, 96 Stat. 1894 (1982); Pub. L. No. 98-139, § 204, 97 Stat. 887 (1983); Pub. L. No. 98-619, § 204, 98 Stat. 3321 (1984). These enactments prevented the use of federal funds to reimburse the cost of abortions except in certain specified circumstances.[3] Following the passage of the Hyde Amendment, DMA took the administrative steps necessary to limit the circumstances under which medical assistance benefits in Georgia would be provided for abortion services to those specified by Congress in the Hyde Amendment.

On May 8, 1979, various plaintiffs, including several Medicaid providers and recipients, filed a class action suit in the United States District Court for the Northern Dis-

---

[3]The circumstances excepted from the Hyde Amendment prohibitions are not relevant to the instant case since the State does not contend that the disallowed expenditures fall within these exceptions.

trict of Georgia seeking declaratory and injunctive relief and asserting that the DMA rules restricting Medicaid payments for abortions deprived female recipients needing "medically necessary" abortions of their rights under the Social Security Act and the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. The trial court entered a preliminary injunction enjoining the State, through DMA, from refusing to provide Medicaid reimbursement for all "medically necessary" abortions on June 5, 1979. *Doe v. Busbee,* 471 F.Supp. 1326 (N.D. Ga. 1979). The district court held that reimbursement to providers for all medically necessary abortions was required by Title XIX and that the Hyde Amendment did not relieve the State of its obligation to reimburse providers for such abortion services. *Id.* at 1330-1334. Shortly after the preliminary injunction was issued, the State moved for an order joining the United States Department of Health, Education and Welfare (HHS's predecessor) and its Secretary as defendants in the action. That motion, which was opposed by the federal agency, was denied on September 20, 1979. *Doe v. Busbee,* No. C79-786A (N.D. Ga. September 20, 1979) (order denying motion to join federal parties).

On December 7, 1979, the trial court granted the plaintiffs' motion for summary judgment, and permanently enjoined DMA from refusing to reimburse medical assistance providers for all medically necessary abortions, despite the Hyde Amendment. That court specifically found that, while the State was not required to fund non-therapeutic abortions, Title XIX required it to reimburse providers for all "medically necessary" abortions. *Doe v. Busbee,* 481 F.Supp. 46 (N.D. Ga. 1979).

On June 30, 1980, in *Harris v. McRae,* 448 U.S. 297 (1980), and *Williams v. Zbaraz,* 448 U.S. 358 (1980), this Court held that a state which participates in the Medicaid program "is not obligated under Title XIX of the Social Security Act to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." *Harris v. McRae, supra,* at 309; *Williams v. Zbaraz, supra,* at 369. In light of the Supreme Court's decision in *Harris* and *Zbaraz,* on October 7, 1980, the trial court in *Doe v. Busbee* issued an order indicating that the state defendants would be entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure should the Fifth Circuit grant the State of Georgia's motion to remand the case to the district court for reconsideration in light of the aforementioned United States Supreme Court decision. *Doe v. Busbee,* No. C79-786A (N.D. Ga. October 7, 1980) (order concerning defendants' entitlement to F.R.Civ.P. Rule 60(b) relief). The State's motion for remand was granted and on January 13, 1981, the trial court vacated its December 7, 1979 order and dismissed the class action complaint, in light of the *Harris* and *Zbaraz* decisions. *Doe v. Busbee,* No. C79-786A (N.D. Ga. Jan. 13, 1981) (first order vacating former decision and dismissing action). The order of January 13, 1981 was subsequently replaced by an order of January 30, 1981, which accomplished the same ends. *Doe v. Busbee,* No. C79-786A (N.D. Ga. Jan. 30, 1981) (order vacating order of Dec. 7, 1979 and dismissing action).

The Secretary's predecessor in office approved Georgia's state plan for medical assistance and all amendments to that plan providing for the reimbursement of health care provider expenses incurred to provide abor-

tion services to eligible recipients. Thereafter, the Secretary refused to provide federal financial participation in expenditures which Georgia incurred for providing abortion services to eligible Medicaid recipients, if these services were not exempted from the Hyde Amendment. By letter dated September 29, 1982, HCFA disallowed $167,392 in FFP for Medicaid-funded abortions. DMA requested reconsideration of that disallowance by the HHS Departmental Grant Appeals Board, pursuant to 45 C.F.R. Part 16. On January 25, 1983, the Board sustained the disallowance.

This action involves the federal share or federal financial participation in the medical assistance program for abortion services during the term of the injunctions issued by the *Doe v. Busbee* Court and for a reasonable time thereafter necessary to notify recipients of a decrease in benefits as required by federal regulations.

REASONS FOR GRANTING THE WRIT

Petitioner prays that this Court grant its petition for certiorari and review the decision of the Court of Appeals in this action because that court erred in reversing the decision of the United States District Court for the Northern District of Georgia's granting petitioner the relief it sought. This case raises an important question of federal law which has not been, but should be, settled by this Court. In *Harris v. McRae, supra* and *Williams v. Zbaraz, supra,* this Court held that it was not the intention of Congress in either Title XIX or the Hyde Amendment to re-

quire States to unilaterally fund medical services for the needy. Yet, the effect of the Eleventh Circut decision in this case is to place the entire financial burden for providing abortion services, ordered under a federal court decision interpreting Title XIX is requiring that those services be provided, upon the State of Georgia. Further, this decision places the risk of future court errors in determining the scope of the joint federal-state Medicaid program entirely upon the states.[4]

I. The Secretary Of Health And Human Services Is Obligated To Pay Federal Financial Participation For State Expenditures Made Pursuant To Title XIX Of The Social Security Act.

The "cornerstone" of the Medicaid Program, established and administered pursuant to Title XIX of the Social Security Act, is cooperative federalism. States which chose to participate in the program must adopt State plans meeting the requirements of federal statutes and regulations. In turn, the Department of Health and Human Services is obligated to fund, through federal financial participation, a substantial proportion of the State's medical assistance program using tax dollars collected from the citizens of the various states. 42 U.S.C. § 1396b(a).

---

[4]The effects of such a decision can result in a substantial loss of funds to the States. HHS disallowed $965,399.00 paid for abortion services by the State of Illinois while that State was under an injunction requiring that those services be provided. *State of Illinois v. United States Department of Health and Human Services*, 772 F.2d 329 (1985). It must be presumed that in the future HHS will take the same position it has espoused here and will refuse to pay FFP when a state, under court order, provides medical services as a part of its Title XIX program, which, it is later determined on appeal, are not within the scope of the program.

While participation in the program is not mandatory, the states have a strong incentive to take part since tax dollars are made available through Title XIX to provide necessary medical services to each State's citizens. This exchange of consideration is in the nature of a contract. *See Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17 (1981).

The Secretary's obligation to provide federal financial participation for expenditures made by the States pursuant to Title XIX was recognized in *Harris v. McRae, supra.* In that case, this Court held that Title XIX did not "obligate a participating State to pay for those medical services for which federal reimbursement is unavailable." The Court based its conclusion upon the mutual obligations established in Title XIX. Describing these obligations, it said:

> "The Medicaid program created by Title XIX is a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons. Under this system of 'cooperative federalism,' *King v. Smith,* 392 U.S. 309, 316, if a State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, which include several mandatory categories of health service, the Federal government agrees to pay a specified percentage of 'the total amount expended . . . as medical assistance under the State plan. . . .' 42 U.S.C. § 1396b(a)(1). *The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State. Nothing in Title XIX as originally enacted, or in its legislative history, suggests that Congress intended to require a participating State to assume the full costs of providing any health services in its Medicaid plan. Quite the contrary, the purpose of Congress*

> *in enacting Title XIX was to provide federal financial assistance for all legitimate state expenditures under an approved Medicaid plan. See* S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1, pp. 83-85 (1965); H.R. Rep. No. 213, 89th Cong., 1st Sess., 72-74 (1965)." *Harris v. McRae, supra* at 308-309. (Emphasis Added).

The funds required to provide abortion services, which were disallowed by the Secretary, were expended by the State of Georgia pursuant to Title XIX of the Social Security Act and its State plan. After the State had argued forcefully that it was not required to fund abortion services, a federal district court ordered it to do so, holding that Title XIX required such expenditures.[5] *Doe v. Busbee,* 481 F.Supp. 46 (N.D. Ga. 1979). Though that conclusion proved to be incorrect, in the State of Georgia, during 1979 and 1980, abortion services were required as a part of the Title XIX Medicaid program. Complying

---

[5]While the Secretary's obligation to pay FFP for the abortion services provided by the Petitioner under court order arises primarily from Title XIX, the Secretary has recognized her obligation to fund court ordered services provided as a part of the Medicaid program in a regulation. 45 C.F.R. § 205.10(b)(3) (1979) provided:

> "(b) Federal financial participation is available for the following items:
>
> * * * * *
>
> (3) Payments of assistance within the scope of Federally aided public assistance programs *made in accordance with a court order.*" (Emphasis Added). (Recodified in 42 C.F.R. § 431.250(b)(2).)

Subsection (b)(3) was added to 42 C.F.R. § 431.250 in 1980. 45 Fed. Reg. 24878 (April 11, 1980); 44 Fed. Reg. 17926 (March 23, 1979). *See* 42 C.F.R. § 431.250 (1979). After this issue arose the Secretary adopted an interpretation of this regulation which rendered it meaningless. The interpretation of this regulation was contested in the courts below and will be fully briefed on appeal if this petition is granted.

with the court order and the judicially determined requirements of the Social Security Act, the State of Georgia funded abortion services as a part of its medical assistance program. Accordingly, Title XIX, as that legislative act has been interpreted by this court in *Harris v. McRae, supra,* requires that the Secretary provide federal financial participation for those expenditures.

II. The Hyde Amendment Does Not Prohibit The Secretary's Payment Of FFP For State Funds Expended Under Title XIX.

The Court of Appeals held that the Hyde Amendment prevented the Secretary from fulfilling her obligations, under Title XIX, to provide FFP for the abortion services at issue here. This conclusion was an error of law.[6]

Title XIX obligates the Secretary to pay FFP for expenditures made by the state pursuant to the Title XIX Medicaid program. *See Harris v. McRae, supra* at 308. The question presented here is whether Congress, in pass-

---

[6]The instant case is distinguishable from other decisions in which federal courts have held that HHS was not required to pay FFP for abortion services provided by State Medicaid plans under federal court order. The injunctions issued against the State Medicaid agencies in Connecticut and Massachusetts were not based upon a finding that Title XIX required the provision of abortion services. *Commonwealth of Massachusetts v. Heckler,* No. 82-1192-N (D. Mass. Feb. 28, 1985) (recommendation of United States Magistrate Robert B. Collins) (objections filed and case pending before district court); *Women's Health Services, Inc. v. Maher,* 514 F.Supp. 265 (D. Conn. 1981). Only one of the injunctions issued against the State of Illinois was based upon a finding that Title XIX required provision of abortion services. It was in effect for only a portion of the time that injunctions required provision of those services. *State of Illinois v. United States Department of Health and Human Services, supra.*

ing the Hyde Amendment, intended to alter the statutorily created obligation of the Secretary to provide FFP when a State provides medical assistance under a Court order construing Title XIX as requiring those payments. A basic tenet of statutory construction is that legislation, enacted at different times, should be harmonized, if possible, so that effect is given to each and they do not conflict. *See generally Watt v. Alaska*, 451 U.S. 259 (1981). In *Harris*, this Court found no indication that it was the intent of Congress in enacting the Hyde Amendment "to shift the entire cost of . . . [medically necessary abortions] . . . to the participating States." *Harris v. McRae, supra*, at 310. Congress has subsequently specifically indicated its intent that the States are not to be *required* to unilaterally provide such services by providing in later versions of the Hyde Amendment that the States could voluntarily provide abortion services as a part of their medical assistance programs. Pub. L. No. 96-369 § 110, 94 Stat. 1356 (1980); Pub. L. No. 96-356, § 109, 94 Stat. 3170 (1981); Pub. L. No. 97-109, 95 Stat. 95 (1981). Thus, consistent with the doctrines of statutory construction this Court should harmonize obligations imposed upon the Secretary in Title XIX and the Hyde Amendment, rather than adopting the Secretary's position that the two legislative enactments are in irreconcilable conflict. *See Morton v. Mancari*, 417 U.S. 535 (1974).

In *Commonwealth of Pennsylvania v. Department of Health and Human Services*, 723 F.2d 1114 (3d Cir. 1984), the United States Court of Appeals for the Third Circuit concluded that Title XIX and the Hyde Amendment must be harmonized to require HHS to pay FFP for those abortions performed, after the adoption of the Hyde Amend-

ment, during the period when the states were required to notify recipients of a decrease in services and the date upon which the federal government was no longer required by injunction to provide for medically necessary abortions. The State of Georgia urges this Court to adopt this rationale and to harmonize the two Congressional enactments.

CONCLUSION

The issue presented by the instant case is of great importance to the States which participate in the medical assistance program in order to obtain access to tax dollars to provide needed medical services to their citizens. The effect of the decision of the United States Court of Appeals for the Eleventh Circuit is to place on the States the entire risk for expenditures made by the States under mistaken court orders interpreting the joint federal-state Title XIX program as requiring the provision of such services. The decision can result in the loss of substantial funds to states who have been guilty of no wrongdoing. Accordingly, the State of Georgia prays that this Court grant this petition and review the decision which it seeks to appeal.

Respectfully submitted,

WILLIAM C. JOY
Senior Assistant Attorney General

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

WILLIAM C. JOY
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3336

APPENDIX A

STATE OF GEORGIA, by its DEPARTMENT OF MEDICAL ASSISTANCE,

Plaintiff-Appellee,

v.

Margaret M. HECKLER, Secretary, Department of Health and Human Services, et al.,

Defendants-Appellants.

No. 84-8472.

United States Court of Appeals, Eleventh Circuit.

Aug. 16, 1985.

This dispute is a product of the litigation concerning the congressional funding restrictions collectively known as the Hyde Amendment, which directed that no federal funds appropriated to pay the federal share of the Medicaid program were to be used to finance certain abortions.[1]

---

1. Beginning in 1976, Congress has continuously prohibited the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. The restrictions have taken the forms of riders to the annual appropriations bill for HHS or joint resolutions. *See*, Pub.L. No. 94-439, § 209, 90 Stat. 1434 (1976); Pub.L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub.L. No. 95-480 § 210, 92 Stat. 1586 (1978); Pub.L. No. 96-86, § 118, 93 Stat. 662 (1979); Pub.L. No. 96-123, § 109, 93 Stat. 926 (1979); Pub.L. No. 96-369, § 110, 94 Stat. 1356 (1980); Pub.L. No. 96-536, § 109, 94 Stat. 3170 (1981); Pub.L. No. 97-12, § 402, 95 Stat. 95 (1981); Pub.L. No. 97-377, § 204, 96 Stat. 1894 (1982); Pub.L. No. 98-139, § 204, 97 Stat. 887 (1983); Pub.L. No. 98-619, § 204, 98 Stat. 3321 (1984). Although these funding restrictions have contained different exceptions over the years, these variations are of no consequence in this case since the parties agree that the disallowed claims at issue are based upon abortions which fell outside the limited exceptions.

Until the United States Supreme Court finally decided that this prohibition against use of federal funds was constitutional and that it relieved the states of any obligation to fund such abortions, the state agency in Georgia was under a federal court injunction to pay for these abortions. It sought reimbursement of $167,392, the amount that would have been paid in federal financial participation by the federal government, had it not been for the Hyde Amendment. The United States Department of Health and Human Services (HHS) disallowed the claim. The district court granted summary judgment for the State of Georgia reversing the disallowance. Because neither the law nor the injunction ordering the State to finance the abortions provides a basis for now compelling the federal government to contribute the federal share in contravention of the Hyde Amendment, we reverse.

After passage of the Hyde Amendment, in a suit brought against the State by persons eligible for medical assistance under Georgia's medicaid program, the United States District Court for the Northern District of Georgia enjoined the State of Georgia from refusing to fund medically necessary abortions through its Medicaid program, first in an order granting preliminary injunctive relief to two individual plaintiffs, *Doe v. Busbee*, 471 F.Supp. 1326 (N.D.Ga. 1979), and later in a final order permanently enjoining the State. *Doe v. Busbee*, 481 F.Supp. 46 (N.D. Ga. 1979). The district court, declining to address the issue of the Hyde Amendment's constitutionality, 481 F. Supp. at 48 n. 3, held that Title XIX of the Social Security Act, 42 U.S.C.A. § 1396 *et seq.*, required the State of Georgia to fund medically necessary abortions through its Medicaid program even absent federal financial participation. 481 F.Supp. at 50; *see* 471 F.Supp. at 1331-34. The

federal Department of Health and Human Services was not a party to that lawsuit.[2]

Meanwhile, on February 18, 1980, a federal district court in New York held the Hyde Amendment unconstitutional, enjoined HHS on a national basis from giving effect to the Hyde Amendment, and required HHS to provide federal funds for medically necessary abortions. *McRae v. Califano*, 491 F.Supp. 630 (E.D.N.Y. 1980). This order was appealed directly to the Supreme Court in expedited fashion. On June 30, 1980, the Supreme Court held that (1) the Hyde Amendment was constitutional and (2) the states participating in Medicaid programs are not required by Title XIX of the Social Security Act to fund abortions which are ineligible for federal funds under the Hyde Amendment. *Harris v. McRae*, 448 U.S. 297, 311, 326, 100 S.Ct. 2671, 2685, 2693, 65 L.Ed.2d 784 (1980). *See also Williams v. Zbaraz*, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980).

In the meantime, Georgia had appealed the district court's injunction in *Doe v. Busbee* to the Fifth Circuit.[3] Shortly after the Supreme Court's decision in *Harris v. McRae*, the district court entered an order indicating the State was entitled to be released from the injunction to pay for these abortions. The Fifth Circuit remanded the case, and on January 13, 1981, the district court entered

---

[2] The State moved to join as parties the U.S. Department of Health, Education and Welfare and its Secretary, Joseph A. Califano (predecessors of the current federal litigants), but on September 20, 1979, the district court denied the motion.

[3] Prior to October 1, 1981, the date when the Eleventh Circuit was formed upon the division of the Fifth Circuit, appeals from the United States District Courts in Georgia were taken to the Fifth Circuit.

an order vacating the injunction and dismissing the class action complaint.

During the time the *Doe v. Busbee* injunction was in effect, the State was compelled to pay the claims of medical service providers who performed medically necessary abortions.[4] The State sought the federal financial share of the subsidized abortions. HHS disallowed the claim on the grounds that the reimbursement sought represented payments for abortions which did not meet the requirements set forth by the Hyde Amendment.[5]

---

[4] The State provided funds for abortions performed during a period immediately after the *Doe v. Busbee* injunction was lifted in January 1981. In February 1981, the State mailed notices of a decrease in services to Medicaid recipients as required by federal law. The notices had an effective date of March 15, 1981. The last quarterly expenditure report to HHS from which a disallowance was made was dated March 31, 1982. The record contains affidavits from State administrators indicating that no funds were paid to health care providers for medically necessary abortions performed after March 15, 1981, and that delay in filing and processing of claims accounts for the year lapse between the latest abortions performed and the last claim presented by the State to HHS.

[5] HHS did not contest claims for medically necessary abortions performed between the entry of the nationwide injunction on February 18, 1980 against HHS in *McRae v. Califano*, 491 F.Supp. 630 (E.D.N.Y.1980), until the Supreme Court's denial in September 1980 of the petitions for rehearing and issuance of mandate in *Harris v. McRae*, 448 U.S. 917, 101 S.Ct. 39, 65 L.Ed.2d 1180 (1980). Thus, the State's claim is for funds expended between December 7, 1979 and February 18, 1980 and between September 30, 1980 through March 31, 1982, the latter date being the date of the last quarterly expenditure report of the State submitted to HHS on which a disallowance occurred.

Initially, the State sought direct judicial review of the HHS decision in the Eleventh Circuit. In *Georgia Department of Medical Assistance v. United States Department of Health and Human Services,* 708 F.2d 627 (11th Cir. 1983), the court held it lacked jurisdiction to review the HHS decision. The State filed the current case in district court, which granted summary judgment for the State, relying chiefly on an HHS regulation which provides that federal funds are available for "payments of assistance within the scope of federally aided public assistance programs made in accordance with a court order." 45 C.F.R. § 205.10(b)(3). *State of Georgia v. Heckler,* 583 F.Supp. 1377 (N.D. Ga. 1984). HHS appealed, asserting that no federal funds were appropriated for this purpose and the prior district court injunction against the state did not affect the law prohibiting federal reimbursement for the abortion services.

[1] HHS claims that regardless of any substantive merit to the State's claim for federal funds, Congress, through the Hyde Amendment, has refused to appropriate money to pay for medically necessary abortions, thereby precluding HHS from paying the disallowed claims. Citing U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), the Antideficiency Act, 31 U.S.C.A. §§ 1341, 1350, and two rulings of the Comptroller General, HHS contends the State's claim may not be paid because Congress has refused to appropriate money for such payment. The underlying suggestion of this argument is that even if a federal court should decide the HHS was wrong under the law in disallowing the claims, HHS would be unable to fund those claims.

This argument begs the question. The Hyde Amendment bars HHS from paying claims such as the one before us only if a court interpreting and following relevant congressional enactments and Supreme Court decisions so holds. The lack of merit to this argument is seen by noting that HHS funded the federal share of medically necessary abortions during the period that it was under an injunction to do so in *McRae v. Califano.* When the Supreme Court reversed that injunction, it gave no indication that the district court's order was invalid because of limits imposed on HHS by the Constitution's appropriations clause, U.S. Const. art. I, § 9, cl. 7. HHS' own regulations require payments "in accordance with a court order." 45 C.F.R. § 205.10(b). There is no doubt that if this Court decided that these payments were legally required, HHS would be authorized to make them.

The question thus becomes whether HHS must provide federal financial participation to satisfy an obligation created by the interaction of the Medicaid funding scheme under Title XIX, the congressional appropriations restrictions set by the Hyde Amendment, and the federal district court injunction imposed on the State in *Doe v. Busbee.* The key to the decision is the effect of the district court injunction.

In lawsuits filed throughout the country during the late 1970's, the Hyde Amendment came under attack on both constitutional and statutory grounds. Courts confronted by these cases ruled in one of three different ways: first, that the states had to fund the abortions even absent federal financial participation; second, that the states had to fund the abortions and the federal government had to provide the federal share; and third, that neither the

states nor the federal government had to fund the abortions. The district court in ordering the State to fund these services followed the first of these three courses, holding the State responsible for payments even if federal funding was not available. It refused to make HHS a party to that litigation, or to address the legal effect of the Hyde Amendment on federal action.

Analyzing the minimum requirements of Title XIX for a state Medicaid plan, *see* 42 U.S.C.A. §§ 1396a (a)(13)(B) and 1396d(a)(1)-(5), the *Doe v. Busbee* court concluded that "[i]t is clear that an abortion is a medical procedure which falls within the five general categories set out in Title XIX." 471 F.Supp. at 1330-31. The court then examined the Hyde Amendment and decided that it operated merely to restrict the use of federal funds for abortions, and that it did not substantively limit Title XIX. *Id.* at 1334. Consequently, it held that Title XIX still required the State of Georgia to fund medically necessary abortions without federal funds. That the district court was holding the state responsible even if federal financing was not available is clearly shown in the language of its order refusing to make the federal agencies party to the litigation.

> It is only necessary for this Court to address the question of whether the State of Georgia's Plan for Medical Assistance satisfies the mandates of Title XIX with respect to medically necessary abortions. Therefore, the federal parties which defendants seek to join have no interest in this case.

A year later, of course, the Supreme Court addressed the same issue, examined Title XIX and its legislative history, and concluded there was no suggestion that Congress intended the states to fund any medical services without

federal assistance. *Harris v. McRae,* 448 U.S. at 308, 100 S.Ct. at 2683. The Court held that "Title XIX does not require a participating State to include in its [Medicaid] plan any services for which . . . Congress has withheld federal funding." 448 U.S. at 309, 100 S.Ct. at 2684. The district court in *Doe v. Busbee* thus relied on a wrong interpretation of the law in ordering the State to assume obligations not mandated by the Medicaid program. Since the decision was based on a rationale that the State was liable, regardless of federal financing, however, it affords no basis for holding HHS responsible for the services there ordered.

[2] With limited exceptions, the Hyde Amendment prohibits the use of any federal funds to reimburse the cost of abortions through the Medicaid program. The *Doe v. Busbee* court did not decide to the contrary. Without a prior judicial decision that it was entitled to federal funding, the State's claim must fail. It made payment it should not have had to make in light of the Supreme Court decision that even if Title XIX would otherwise require the participating states to include medically necessary abortions in their Medicaid plans, "the withdrawal of federal funding under the Hyde Amendment would operate to relieve the State of that obligation for those abortions for which federal reimbursement is unavailable." *Harris v. McRae,* 448 U.S. at 310, 100 S.Ct. at 2684; *see also Williams v. Zbaraz,* 448 U.S. 358, 368-69, 100 S.Ct. 2694, 2700-01, 65 L.Ed.2d 831 (1980).

The State is in no different position than HHS was while it was under a direct court injunction to make payments it should not have been required to make. *See McRae v. Califano,* 491 F.Supp. 630 (E.D.N.Y. 1980). Just

as the federal government could not collect from the states the payments made to the states under that later reversed injunction, the state here cannot impose those payments on HHS, which was not even a party to the *Doe v. Busbee* litigation.

Three other courts have faced the issue raised in this case. Two have already ruled in favor of HHS. *State of Illinois v. U.S. Dep't of Health and Human Services,* 594 F.Supp. 147, 154 (N.D. Ill. 1984), *appeal docketed,* No. 84-2535 (7th Cir. Sept. 6, 1984), *argued* (April 23, 1985); *Women's Health Services, Inc. v. Maher,* 514 F.Supp. 265 (D.Conn.1981). The third case is pending on cross-motions for summary judgment, but a magistrate's report has been filed recommending the granting of HHS' motion and the denial of the state's motion. *Commonwealth of Massachusetts v. Heckler,* No. 82-1197-N (D.Mass. Feb. 28, 1985) (magistrate's report and recommendations). The state has filed exceptions to the magistrate's report necessitating *de novo* review by the district court.

As in the Massachusetts and Connecticut cases, HHS was not here a party to the lawsuit compelling the State to reimburse the medical service providers. As in the Illinois litigation, HHS was not subject to the federal court injunction. The orders entered by the district court had no effect against the federal parties in the litigation. *See State of Illinois v. U.S. Department of HHS,* 594 F.Supp. at 154 (citing *Williams v. Zbaraz,* 448 U.S. at 366, 100 S.Ct. at 2699 ("The District Court did not . . . enjoin any action by the United States.")).

[3] The State contends, however, that an HHS regulation entitles it to payment of federal funds. The pertinent portion of that regulation provides:

> (b) Federal financial participation is available for the following items:
>
> . . . . .
>
> (3) payment of assistance within the scope of federally aided public assistance programs made in accordance with a court order.

45 C.F.R. § 205.10(b)(3). The district court held that this regulation

> created an enduring exception to other laws, whether existing or future, that might either restrict or fail to authorize payment. Therefore, the Hyde Amendment, instead of limiting the regulation, is itself restricted by the regulation and does not bar payment in this case.

583 F.Supp. at 1381.

The district court's application of the regulation fails to withstand analysis. First, 45 C.F.R. § 205.10, read as a whole, is intended to sanction the payment of federal funds where a state has made payments "within the scope of Federally aided public assistance programs" upon court order after judicial review of agency decisions made after hearings. *See id.* § 205.10(a). In 1970, when the current version of section 205.10 was proposed, a stated purpose of the regulation was that it provide "[an] opportunity for fair hearing, with continuation of assistance in cases involving individual issues of facts or judgment regarding termination or reduction of assistance." 35 Fed.Reg. 8448 (May 29, 1970). In 1980, HHS promulgated a parallel regulation, 42 C.F.R. § 431.250, with nearly identical wording, that was to apply solely to Medicaid. The accompanying explanation noted that the regulation "concerns [federal funds] for expenditures in services for individuals who are successful in their appeal" from a denial of benefits. 45 Fed.Reg. 24878 (April 11, 1980). The explana-

tion further stated that "even where there is a court order against a State to provide services beyond the limits of the program, [federal funds are] not available when there are other regulatory provisions which impose limitations (such as separate time limits or limitations on types of services) upon the receipt of Federal funds." *Id.* Clearly, then, the regulation provides for federal funds to be furnished where a court has ordered a state to provide Medicaid benefits that would have been eligible for federal funds had the state, in implementing its federally approved program, provided those funds on its own initiative, and not where a court has ordered a state to pay benefits on the basis of an interpretation that Title XIX requires such payments despite the unavailability of federal funds. Simply put, the payments required of the State by court order were not payments "of assistance within the scope of federally aided public assistance programs."

The district court noted, and the State apparently concedes, that the 1980 explanation of the regulation "appear[ed] to exclude the availability of [federal funds] in the circumstances of this case." 583 F.Supp. at 1380 n. 2. The court nevertheless refused to adopt this interpretation of the regulation because it was a *post hoc* rationalization offered after the issues in the current case arose. *Id.* The Supreme Court has held, however, that even agency regulations promulgated in response to a suit are generally entitled to deference. *United States v. Morton,* — U.S. —, — n. 21, 104 S.Ct. 2769, 2777 n. 21, 81 L.Ed.2d 680, 692 n. 21 (1984). The district court also found that the agency's interpretation of section 205.10 rendered it "superfluous," reasoning that the "regulation was designed to reimburse states for payments under court order where statutory or

regulatory authority was either absent or unclear." 583 F.Supp. at 1381. Under the agency's explanation, however, the regulation still applies where a dispute has arisen involving "issues of fact and judgment" regarding a particular beneficiary's entitlement to assistance under the federally approved plan and a court has ordered the State to make payments. 35 Fed.Reg. 8448. The regulation and its accompanying explanations distinguish between cases requiring case-specific factual adjudication after evidentiary hearings and cases involving determinations of the extent of federal participation in the programs. 45 Fed. Reg. 24878. Such a distinction does not render the regulation "superfluous." The agency's interpretation of the regulation is entitled to great deference, and "must be upheld unless it is so plainly erroneous or so inconsistent with the regulation or the statute authorizing the regulation that its decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *South Georgia Natural Gas Co. v. FERC*, 699 F.2d 1088, 1090 (11th Cir. 1983). We find nothing that renders the agency interpretation of its regulation unreasonable.

[4] Second, even if the regulation were applicable to the situation at hand, it can have no effect in the face of a subsequent contrary legislative enactment. We agree with the court in *State of Illinois v. U.S. Dep't of HHS:*

> The obvious flaw in [the State's] argument is that a regulation, like § 205.10(b)(3), cannot displace a valid statutory provision, like the Hyde Amendment. To the extent that § 205.10(b)(3) is inconsistent with the specific federal funding restrictions contained in the Hyde Amendment, we cannot give effect to § 205.10 (b)(3).

594 F.Supp. at 155. This reasoning is in accordance with the well established rule that an agency regulation which

conflicts with a statute passed by Congress is without any legal effect. *See, e.g., United States v. Larionoff,* 431 U.S. 864, 873, 97 S.Ct. 2150, 2156, 53 L.Ed.2d 48 (1977); *see also Florida Gas Transmission Co. v. FERC,* 741 F.2d 1307, 1309-10 (11th Cir. 1984). The district court erred in relying on 45 C.F.R. § 205.10(b)(3) in granting summary judgment for the State.

Absent a court order against it or any controlling law or regulation, HHS cannot be compelled to pay federal funds contrary to the Hyde Amendment to reimburse the State for funds it expended for medically necessary abortions performed during the period when the State was required to fund such abortions pursuant to court order.

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
C83-594A

STATE OF GEORGIA, by its
DEPARTMENT OF MEDICAL
ASSISTANCE,

Plaintiff,

v.

MARGARET HECKLER, *et al.*,

Defendants.

ORDER

This is an action for judicial review of a decision by the Secretary of Health and Human Services (HHS) to disallow claims by the State of Georgia for reimbursement ("federal financial participation" or "FFP") by the federal government of Medicaid payments. The parties have filed cross-motions for summary judgment; they agree that there is no dispute of material facts and that the case may be decided as a matter of law.

Factual Background

The following facts are not in dispute.

1.

Since September 30, 1976, the United States Congress has prohibited the use of any federal funds to reimburse the cost of certain abortions under the Medicaid program.

This funding restriction has commonly been known as the "Hyde Amendment". Following this Congressional initiative, the Georgia Department of Medical Assistance promulgated rules whereby Medicaid reimbursement for abortions was available only if one of several conditions was met. The conditions established by the State agency tracked the language of the federal Hyde Amendment.

2.

On May 8, 1979, various plaintiffs, including several Medicaid providers, filed a class action lawsuit in the United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action No. C79-786A. These plaintiffs claimed that the rule promulgated by the State Department of Medical Assistance denied them and the indigent women patients needing medically necessary abortion services their rights under the Social Security Act and the United States Constitution. Plaintiffs sought declaratory and injunctive relief on behalf of a physician class and a patient class.

3.

On June 4, 1979, the trial court entered a preliminary injunction which enjoined the State of Georgia, through its Department of Medical Assistance, from refusing to provide Medicaid payments for all medically necessary abortions, even though federal funding of such abortions was precluded by the Hyde Amendment. *See Doe v. Busbee*, 471 F.Supp. 1326 (N.D. Ga. 1979). The trial court reasoned that the Hyde Amendment did not operate to impose a limitation on Title XIX of the Social Security Act, 42 U.S.C. § 1396, *et seq.*, which, in the Court's view,

obligated states to fund all medically necessary abortions. The court did not declare the Hyde Amendment unconstitutional or strike down the HHS regulations implementing that Amendment.

4.

Shortly after the issuance of the June 4, 1979 injunction, the Georgia Department of Medical Assistance moved for an order joining the United States Department of Health, Education and Welfare (now HHS) and its Secretary as defendants in the class action based, in part, on the State Agency's risk of incurring inconsistent obligations. The motion for joinder of the federal agency under Rule 19(a), Fed.R.Civ.P., was denied by order of the trial court dated September 20, 1979.

5.

On December 7, 1979, the trial court granted the plaintiffs' motion for summary judgment, and permanently enjoined the Georgia Department of Medical Assistance from restricting Medicaid payment for medically necessary abortions insofar a such restrictions were inconsistent with Title XIX of the Social Security Act, notwithstanding the restrictions present in the Hyde Amendment. *See Doe v. Busbee*, 481 F.Supp. 46 (N.D. Ga. 1979).

6.

On January 11, 1980, the Georgia Department of Medical Assistance filed an appeal of the trial court's December 7, 1979, order to the United States Court of Appeals for the Fifth Circuit. On June 30, 1980, the United States Supreme Court in *Harris v. McRae*, 448 U.S. 297 (1980),

and *Williams v. Zbaraz*, 448 U.S. 358 (1980), held that a state which participates in the Medicaid program is not obligated under Title XIX of the Social Security Act to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.

7.

In light of the Supreme Court's decision in *Harris* and *Zbaraz*, the trial court, on October 7, 1980, issued an order indicating that the state defendants would be entitled to Rule 60(b), Fed.R.Civ.P., relief should the Fifth Circuit Court of Appeals remand the case to the trial court. On December 19, 1980, the Fifth Circuit granted the State of Georgia's motion to remand the case to the District Court for reconsideration in light of the aforementioned United States Supreme Court decisions. On January 13, 1981, the trial court vacated its December 7, 1979, order and dismissed the class action complaint, in light of the *Harris* and *Zbaraz* decisions.

8.

The State of Georgia paid $167,392 to compensate medical providers for medically necessary abortions performed outside of both State restrictions and the Hyde Amendment limitations in compliance with the federal court orders in *Doe v. Busbee*.

9.

The Secretary's predecessor in office approved Georgia's state plan for medical assistance, and all amendments to it, concerning the compensation of health care providers

performing abortion services for eligible recipients. Despite the Secretary's approval of Georgia's state plan, the Secretary refused to provide federal financial participation (FFP) in expenditures which the State of Georgia incurred as medical assistance if these expenditures were related to the reimbursement of the costs of providing abortion services to eligible Medicaid recipients, and if the services were not mentioned in the so-called "Hyde Amendment" or its various successors to federal Medicaid appropriations legislation.

10.

The Secretary's refusal to provide FFP resulted in Georgia's having to bear the entire financial burden of complying with the various orders which the trial court entered in the *Doe v. Busbee* case. The Secretary's decision to refuse FFP to Georgia for Medicaid abortion services provided in excess of the restrictions of the Hyde Amendment was implemented through the so-called "disallowance" procedure. 42 U.S.C. § 1316(d); 45 C.F.R. §§ 201.10-201.14. By letter dated September 29, 1982, the Health Care Financing Administration of HHS disallowed $167,392 in FFP for Medicaid-funded abortions performed during the period from December 7, 1979, to February 18, 1980, and September 30, 1980, to March 31, 1982, that did not meet the criteria for federal funding contained in the Hyde Amendment.

11.

The Georgia Department of Medical Assistance requested reconsideration of the disallowance issued by HCFA from the Departmental Grant Appeals Board, pursuant to 45 C.F.R. Part 16. HHS's Departmental Grant

Appeals Board upheld the disallowance by HCFA based upon its finding that the $167,392 represented payments to health care providers participating in the Medicaid program for performing certain abortions which did not meet the requirements of the "Hyde Amendment". The state of Georgia now seeks judicial review in this Court.

Discussion

The sole legal question in this case is who must bear the cost of Medicaid payments that a federal district court, construing federal law, forced the State of Georgia to make during a short-lived injunction that was vacated when the Supreme Court issued a ruling contrary to the district court's decision. The State of Georgia claims that the Department of Health and Human Services is obliged to reimburse the State, in keeping with normal federal financial participation in state Medicaid programs, for payments required by the injunction. On the other hand, the Department contends that the Hyde Amendment absolutely prohibits federal reimbursement of those payments and that, furthermore, the injunction in *Doe v. Busbee* applied only to the State and not to the Department.

In claiming that the Department must reimburse the State for its Medicaid payments required in *Doe v. Busbee,* the State relies upon a federal regulation authorizing federal reimbursement for state payments under court order. The regulation, 45 C.F.R. § 205.10(b)(3) (1978),[1] stated that:

> Federal financial participation is available for the following items:
>
> . . .

---

[1] The regulation was recodified in 1980, and is now found at 45 C.F.R. § 205.10(b)(3) (1983).

(3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

The Department denies a duty to provide FFP under this regulation, first, because the payments were not "within the scope of Federally aided public assistance programs," and, second, because the regulation is itself limited by the Hyde Amendment which prohibits any federal expenditures for the abortions involved here.

The Court determines that the payments were "within the scope of Federally aided public assistance programs made in accordance with a court order.[2] The Court in

---

[2] The Department claims that the payments at issue in his case were not "within the scope of Federally aided public assistance programs" because Georgia's payments for abortions did not meet the certification and documentation requirements of the regulations implementing the Hyde Amendment, or the requirements of the statute itself. The Court does not read the regulations so restrictively. "Within the scope of" is broader than "conforming to every certification and documentation requirement," and, in context, includes payments by states under their Medicaid programs in general. The Court notes that an explanation of the regulation at 45 Fed. Reg. 24878 (April 11, 1980) appears to exclude the availability of FFP in the circumstances of this case. That explanation states: "even when there is a court order against a State to provide services beyond the limits of the program, FFP is not available when there are other regulatory provisions which impose limitations (such as separate time limits or limitations on types of services) upon the receipt of Federal funds."

The Court finds that explanation, revealed after the issues of this case arose, to be a *post hoc* rationalization with no bearing upon this case. The Court finds the context of the regulation as originally promulgated, *see* 35 Fed. Reg. 8448 (May 29, 1970) (proposed rule making); 36 Fed. Reg. 3034 (February 13, 1971) (adoption of rule), instructive in reaching its interpretation of the regulation, that the states are to receive FFP in circumsances where they are forced to pay benefits over the objection of the federal government so long as the payments are within the general scheme of the assistance programs.

Doe v. Busbee compelled the State to make the payments on the grounds that Title XIX of the Social Security Act required them. Even though the ruling was later vacated and the reasoning abrogated, the basis of the injunction was that the Medicaid law required the payments. For that reason, the State of Georgia is entitled to FFP from the Department under the regulation.

The Hyde Amendment does not restrict the application of this regulation. It is clear that the regulation was designed to reimburse states for payments required under court order where statutory or regulatory authority was either absent or unclear. Any other construction of the regulation would make it superfluous.[3] The regulation appears ideally suited for the case at bar, in order to protect the states which, as dispensers of the benefits, might be ordered to dispense them when the federal authority was dubious. In *Doe v. Busbee* and in similar cases involving other states, the effect and even the constitutional-

---

[3] The Department states that the regulation "simply establishes a general agency policy to participate in payments, *otherwise proper,* states make pursuant to court order." Defendants' memorandum at 19 (emphasis added). If the regulation merely authorized payments that were already authorized under program rules, then there would be no need for the regulation. In order for the regulation to have application, the Court reads it as providing federal participation in payments, *otherwise improper* under program rules, that states are forced to make by courts.

ity of the Hyde Amendment were seriously disputed, and the regulation served as a protection for states where they were told in effect by courts to do one thing and by the Department to do another.

Nor did the Hyde Amendment annul the regulation. The regulation created an enduring exception to other laws, whether existing or future, that might either restrict or fail to authorize payment. Therefore the Hyde Amendment, instead of limiting the regulation, is itself restricted by the regulation and does not bar payment in this case. If the Court in *Doe v. Busbee* relied upon a view of the law that was later rejected and deemed erroneous, that does not relieve the federal government of the responsibility for contributing to State payments erroneously enforced by a court construing federal law.

Although the Court in *Doe v. Busbee* acknowledged that the State might be solely responsible for the payments enforced in the case, *see* 471 F.Supp. at 1333 ("it is not the case, nor is it required by Title XIX, that there be federal financial participation in every service necesssarily provided by a participating state"), that does not determine whether the Department is liable to the State for reimbursement. The Supreme Court's opinion in *Harris v. McRae,* 448 U.S. 297 (1980), made it clear that State payments and federal reimbursements were in lockstep as far as Title XIX of the Social Security Act was concerned. The Court said:

> The Medicaid program created by Title XIX is a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons. Under this system of "cooperative federalism," if a

> State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, which includes several mandatory categories of health services, the Federal Government agrees to pay a specified percentage of "the total amount expended . . . as medical assistance under the State plan . . ." 42 U.S.C. § 1396b(a)(1). The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State. Nothing in Title XIX as originally enacted, or in its legislative history, suggests that Congress intended to require a participating State to assume the full costs of providing any health services in its Medicaid plan. Quite the contrary, the purpose of Congress in enacting Title XIX was to provide federal financial assistance for all legitimate state expenditures under an approved Medicaid plan.

448 U.S. at 308 (citations omitted; ellipsis in original).

Drawing from the last sentence of the language quoted above, the Court finds that payment by the State of Georgia, pursuant to the injunction of a federal court construing federal statutes, was a "legitimate state expenditure[] under an approved Medicaid plan" for which the federal financial participation is required.

Accordingly, this Court holds that the decision of the Secretary to disallow FFP for Medicaid payments by the State of Georgia as ordered in *Doe v. Busbee* was unlawful and must be reversed. The Court therefore GRANTS plaintiff's motion for summary judgment, DENIES defendants' motion for summary judgment; the Court REVERSES the decision of the Secretary of Health and Human Services, and REMANDS the case to her for action consistent with this opinion.

IT IS SO ORDERED, this 6th day of April, 1984.

/s/ Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

APPENDIX C

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Georgia Department of Medical Assistance DATE: January 25, 1983

Docket No. 82-209
Decision No. 375

DECISION

The Georgia Department of Medical Assistance (State) appealed a decision by the Health Care Financing Administration (Agency) disallowing federal financial participation (FFP) claimed by the State under Title XIX of the Social Security Act (Medicaid). The Agency disallowed $167,392 in FFP claimed by the State for abortion services performed during the periods December 7, 1979 to February 18, 1980 and September 30, 1980 to March 31, 1982. The State appealed the entire disallowance. Upon receipt of the State's appeal, the Board determined that the sole issue raised in this appeal was virtually identical to that present in Board Decisions Nos. 260 and 305. In Joint Consideration-Abortion Funding, Decision No. 260, February 26, 182, the Board found that the clear language of the Hyde Amendment[1] restricted the Agency's authority to ex-

---

[1] The Hyde Amendment restricted the availability of funding for medically necessary abortions and has been a rider to appropriations acts for the Department of Health, Education and Welfare (now HHS) since 1977. When first enacted as a rider to the FY 1977 appropriations it read: "None of the

(Continued on following page)

pend federal funds for the abortions in question and that the restriction was not overcome by court orders which did not direct the Agency to make payments. In Ohio Department of Public Welfare, Decision No. 305, May 28, 1982, the Board, in addition to reaffirming Decision No. 260, held that, even where a state arguably may have been required by federal regulation to give notice prior to reducing Medicaid abortion services, FFP was not available because of the Hyde Amendment's restrictions. Based on those decisions, the Board ordered both parties to show cause why the Board should not uphold this disallowance based on its earlier analysis. For the reasons outlined below, we uphold the Agency disallowance determination.

I. Background

The State has provided the following background to this appeal:

In May 1979, the State was named as a defendant in a lawsuit, originally brought in United States District Court, which challenged State statutory restrictions on the funding of abortion services for Medicaid recipients. *Doe v.*

(Continued from previous page)

funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." Pub. L. 94-439, section 209, September 30, 1976. A later version extended funding for abortions in cases of rape and incest where appropriately reported, or where two physicians determined that severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. Pub. L. 95-205, section 101, December 9, 1977; Pub. L. 95-480, section 210 October 18, 1978. Other versions omitted the third category of severe and long-lasting physical health damage. Pub. L. 96-86, section 118, October 12, 1979; Pub. L. 96-123, section 109, November 20, 1979. There is no dispute regarding the various differences; therefore, we use the term Hyde Amendment in a generic sense.

Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979). The State indicated that, at the time of the suit, its laws limited Medicaid reimbursement for abortions to situations where (1) the life of the mother would be endangered if the fetus were carried to term; (2) severe and long-lasting physical health damage to the mother would result if pregnancy were carried to term; or (3) the mother was a victim of rape or incest, and the incident was reported promptly. These provisions paralleled the then-existing provisions of the Hyde Amendment. (State's Brief, pp. 2-3)

On June 4, 1979, the District Court entered a preliminary injunction which enjoined the State from refusing to provide Medicaid reimbursement for all medically necessary abortions. Shortly after the injunction was issued, the State sought to join the Department of Health, Education and Welfare (now Health and Human Services) (Department) based upon the State's risk of incurring inconsistent obligations. The Court denied the defendant's motion for joinder. On December 7, 1979, the District Court granted plaintiff's motion for summary judgment, and permanently enjoined the State from restricting Medicaid reimbursement for medically necessary abortions insofar as such restrictions were inconsistent with Title XIX, notwithstanding restrictions present in the Hyde Amendment. The State appealed to the United States Court of Appeals for the Fifth Circuit. In December 1980, the Fifth Circuit granted the State's motion to remand the case to the District Court for reconsideration in light of the Supreme Court decisions in *Harris v. McRae,* 448 U.S. 297 (1980), and *Williams v. Zbaraz,* 448 U.S. 358 (1980), which held that a state is not required under Title XIX to fund medically necessary abortions for which Congress has withheld

FFP pursuant to the Hyde Amendment. In January 1981, the District Court vacated its December 1979 order and dismissed the plaintiff's complaint. (State's Brief, pp. 2-4)

II. Analysis

The State responded to the Board's Order to Show Cause by requesting the following relief: (1) that the Board stay proceedings in this appeal pending the outcome of the court appeals which have resulted from Board Decision No. 260, or (2) that the Board reverse the disallowance. We deny the State's request for a stay and uphold the disallowance.

A. The Stay

At this time, both the Commonwealth of Massachusetts and the State of Illinois are appealing Board Decision No. 260.[2] The State urged the Board to stay this appeal based on several federal court decisions which the State claims support the proposition that a tribunal may enter a stay of an action before it, pending resolution of independent proceedings which bear heavily on the case-in-chief, for the sake of judicial and administrative economy, especially where the issues are identical. (State's Brief, pp. 6-7) The Agency relied upon the Board's rationale in Decision No. 260 as the basis for the disallowance and argued that the Board should decide the appeal without delay.

We do not agree with the State that administrative economy would be served by granting a stay in this appeal. The

---

[2] *Commonwealth of Massachusetts v. Schweiker*, C.A. No. 82-1197-N (D. Mass. 1982); *State of Illinois v. United States Department of Health and Human Services*, C.A. No. 82C-4170 (N.D. Ill. 1982).

State has not presented any rationale to support its request other than to note circumstances under which a stay may be appropriate. An adverse decision in this appeal would not affect any right the State has to appeal the Board's decision to federal district court. Given the current status of this appeal and the State's potential judicial remedies, we believe that to issue a stay for an indefinite period of time would be more of a burden than a benefit to the administrative process in which the appeal is involved.

B. The Disallowance

The Board's Order to Show Cause directed both the State and the Agency to show cause why the Board should not uphold this disallowance on the basis of its decisions Nos. 260 and 305.

In response to the Order, the State sought to distinguish its case from Decision No. 260 by pointing out that it sought to join (albeit unsuccessfully) the Department as a defendant in *Doe v. Busbee, supra.* while the States in Decision No. 260 did not even request joiner. The State cited Decision No. 260 which stated that "the fact that the State did not request [joiner of the Department] has to be at least a contributing factor [to the courts not ordering the Department to reimburse the states]." Decision No. 260, p. 13.

The language from Decision No. 260, relied on by the State, was not the basis of that decision and referred to the specific factual situations in those appeals, in which the states did not even request that the Department be joined. The Board did not intend to imply that if a court rejected a state's request to join the Department, the Department would nevertheless be bound by the court's ruling. The

fact remains that, in this appeal, the District Court did not order the Department to provide FFP for payments made by the State for abortion services. Thus, the legal issue raised in this appeal is not substantially different than the issue raised in the appeals before the Board in Decision No. 260, and the State has presented no persuasive argument why we should not uphold this disallowance.

III. Conclusion

The issue present in this appeal has been extensively analyzed in Decisions Nos. 260 and 305. Neither party has demonstrated any substantial reason why our analysis in that decision should not control here. Therefore, we uphold the Agency decision to disallow $167,392 in FFP claimed by the State.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle
Presiding Board Member

APPENDIX D

42 U.S.C. § 1396 (1983):

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health and Human Services, State plans for medical assistance.

---

42 U.S.C. § 1396b(a):

(a) Computation of amount

From the sums appropriated therefor, the Secretary (except as otherwise provided in this section) shall pay to each State which has a plan approved under this subchapter, for each quarter, beginning with the quarter commencing January 1, 1966—

> (1) an amount equal to the Federal medical assistance percentage (as defined in section 1396*d*(b) of this title, subject to subsections (g), (h), and (j) of this section) of the total amount expended during such quarter as medical assistance under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter, for individuals who are eligible for medical assistance under the plan

and (A) are receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, or (B) with respect to whom there is being paid a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of this title, and, except in the case of individuals sixty-five years of age or older and disabled individuals entitled to hospital insurance benefits under subchapter XVIII of this chapter who are not enrolled under part B of subchapter XVIII of this chapter, other insurance premiums for medical or any other type of remedial care or the cost thereof); plus

(2) an amount equal to 75 per centum of so much of the sums expended during such quarter (as found necessary by the Secretary for the proper and efficient administration of the State plan) as are attributable to compensation or training of skilled professional medical personnel, and staff directly supporting such personnel, of the State agency or any other public agency; plus

(3) an amount equal to—

(A)(i) 90 per centum of so much of the sums expended during such quarter as are attributable to the design, development, or installation of such mechanized claims processing and information retrieval systems as the Secretary determines are likely to provide more efficient, economical, and effective administration of the plan and to be compatible with the claims processing and information retrieval systems utilized in the administration of subchapter XVIII of this chapter, including the State's share of the cost of installing such a system to be used jointly in the administration of such State's plan and the plan

of any other State approved under this chapter, and

(ii) 90 per centum of so much of the sums expended during any such quarter in the fiscal year ending June 30, 1972, or the fiscal year ending June 30, 1973, as are attributable to the design, development, or installation of cost determination systems for State-owned general hospitals (except that the total amount paid to all States under this clause for either such fiscal year shall not exceed $150,000), and

(B) 75 per centum of so much of the sums expended during such quarter as are attributable to the operation of systems (whether such systems are operated directly by the State or by another person under a contract with the State) of the type described in subparagraph (A)(i) (whether or not designed, developed, or installed with assistance under such subparagraph) which are approved by the Secretary and which include provision for prompt written notice to each individual who is furnished services covered by the plan, or to each individual in a sample group of individuals who are furnished such services, of the specific services (other than confidential services) so covered, the name of the person or persons furnishing the services, the date or dates on which the services were furnished, and the amount of the payment or payments made under the plan on account of the services; and

(C) 75 per centum of the sums expended with respect to costs incurred during such quarter (as found necessary by the Secretary for the proper and efficient administration of the State plan) as are attributable to the performance of medical and utilization review by a utilization and quality control peer review organization under a contract entered into under section 1396a(d) of this title; plus

(4) Omitted

(5) an amount equal to 90 per centum of the sums expended during such quarter which are attributable to the offering, arranging, and furnishing (directly or on a contract basis) of family planning services and supplies;

(6) subject to subsection (b)(3) of this section, an amount equal to—

(A) 90 per centum of the sums expended during such a quarter within the twelve-quarter period beginning with the first quarter in which a payment is made to the State pursuant to this paragraph, and

(B) 75 per centum of the sums expended during each succeeding calendar quarter,

with respect to costs incurred during such quarter (as found necessary by the Secretary for the elimination of fraud in the provision and administration of medical assistance provided under the State plan) which are attributable to the establishment and operation of (including the training of personnel employed by) a State medicaid fraud control unit (described in subsection (q) of this section); plus

(7) an amount equal to 50 per centum of the remainder of the amounts expended during such quarter as found necessary by the Secretary for the proper and efficient administration of the State plan.

Portions of Pub. L. No. 94-439, 90 Stat. 1418, 1429, 1434 (1976):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of Labor and Health, Education, and Wel-

fare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes, namely:

* * *

SOCIAL AND REHABILITATION SERVICE

PUBLIC ASSISTANCE

For carrying out, except as otherwise provided, titles I, IV, X, XI, XIV, XVI XIX, and XX of the Social Security Act, and the Act of July 5, 1960 (24 U.S.C., ch. 9) $18,040,850,000, of which $56,500,000 shall be for child welfare services under part B of title IV.

For making, after June 30 of the current fiscal year, payments to States under titles I, IV, X, XIV, XVI, XIX and XX, respectively, of the Social Security Act, for the last three months of the current fiscal year (except with respect to activities included in the appropriation for "Work incentives"); and for making after July 31 of the current fiscal year, payments for the first quarter of the succeeding fiscal year; such sums as may be necessary, the obligations incurred and the expenditures made thereunder for payments under each of such titles to be charged to the subsequent appropriations therefor for the current or succeeding fiscal year.

In the administration of title I, IV (other than part C thereof), X, XIV, XVI, XIX, and XX, respectively, of the Social Security Act, payments to a State under any such titles for any quarter in the period beginning July 1, 1976, and ending September 30, 1977 may be made with respect to a State plan approved under such title prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.

Such amounts as may be necessary from this appropriation shall be available for grants to States for any period in fiscal year 1976 and the period July 1, 1976 through September 30, 1976 subsequent to March 31, 1976.

* * *

GENERAL PROVISIONS

* * *

Sec. 209. None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

Pub. L. No. 95-205, 91 Stat. 1459 (1977):

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several department, agencies, corporations, and other organizational units of the Government for the fiscal year 1978, namely:

Sec. 101. Such amounts as may be necessary for continuing projects or activities which were conducted in the fiscal year 1977, and for which appropriations, funds, or other authority would be available in the District of Columbia Appropriations Act, 1978 (H.R. 9005) as passed the House of Representatives or the Senate, but at a rate of operations not in excess of the current rate: *Provided,* That the Advisory Neighborhood Commissions shall be continued at an annual rate of not to exceed $500,000: *Provided further,* That the rate of operations for the Dis-

aster Loan Fund of the Small Business Administration contained in said Act shall be the rate as passed the Senate.

Such amounts as may be necessary for projects or activities provided for in the Departments of Labor, and Health, Education, and Welfare, and Related Agencies Appropriation Act, 1978 (H.R. 7555), at a rate of operations, and to the extent and in the manner, provided for in such Act, notwithstanding the provisions of Sec. 106 of this joint resolution: *Provided,* That none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced.

Sec. 102. Appropriations and funds made available and authority granted pursuant to this joint resolution shall be available from December 1, 1977, and shall remain available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) September 30, 1978, whichever first occurs.

Portions of Pub. L. No. 95-480, 92 Stat. 1567, 1576, 1586 (1978):

Be it enacted by the Senate, and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Departments of Labor, and Health, Education, and Welfare, and related agencies for the fiscal year ending September 30, 1979, and for other purposes, namely:

* * *

TITLE II—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

* * *

HEALTH CARE FINANCING ADMINISTRATION

GRANTS TO STATES FOR MEDICAID

For carrying out, except as otherwise provided, title XIX of the Social Security Act, $11,250,000,000.

For making, after June 30 of the current fiscal year, payments to States under title XIX of the Social Security Act, for the last three months of the current fiscal year; and for making after July 31 of the current fiscal year, payments for the first quarter of the succeeding fiscal year; such sums as may be necessary, the obligations incurred and the expenditures made thereunder for payments under such title to be charged to the subsequent appropriation therefor for the current or succeeding fiscal year.

In the administration of title XIX of the Social Security Act, payments to a State under such title for any

quarter in the period beginning July 1 of the prior year and ending September 30 of the current year may be made with respect to a State plan approved under such title prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.

Such amounts as may be necessary from this appropriation shall be available for grants to States for any period in the prior fiscal year subsequent to June 30 of that year.

• • •

Sec. 210. None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

Portions of Pub. L. No. 96-86, 93 Stat. 656, 659, 662 (1979):

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1980, and for other purposes, namely:

Sec. 101. . . .

* * *

(j) Such amounts as may be necessary for projects or activities provided for in the Departments of Labor, and Health, Education, and Welfare and Related Agencies Appropriation Act, 1980 (H.R. 4389), at a rate of operations, and to the extent and in the manner, provided for in such Act as adopted by the House of Representatives on August 2, 1979, except as provided in section 118 of this joint resolution and notwithstanding the provisions of section 106 of this joint resolution.

* * *

Sec. 118. Notwithstanding any other provision of this joint resolution except section 102, none of the Federal funds provided by this joint resolution for the District of Columbia, Foreign Assistance and Related Programs, the Departments of Labor and Health, Education, and Welfare, or the Department of Defense shall be used to per-

form abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; . . . .

Portions of Pub. L. No. 96-123, 93 Stat. 923, 925, 926 (1979):

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1980, and for other purposes, namely:

* * *

(g) Such amounts as may be necessary for projects or activities provided for in the Departments of Labor, and Health, Education, and Welfare and Related Agencies Appropriation Act, 1980 (H.R. 4389), at a rate of operations, and to the extent and in the manner, provided for in such Act as adopted by the House of Representatives on August 2, 1979, notwithstanding the provisions of section 106 of this joint resolution.

* * *

Sec. 109. Notwithstanding any other provision of this joint resolution except section 102, none of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service; . . . .

Portions of Pub. L. No. 96-369, 94 Stat. 1351, 1356 (1980):

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1981, and for other purposes, namely:

Sec. 101. (a)(1) Such amounts as may be necessary for projects or activities (not otherwise specifically provided for in this joint resolution) for which appropriations, funds, or other authority would be available in the following appropriation Acts:

Agriculture, Rural Development, and Related Agencies Appropriation Act, 1981;

District of Columbia Appropriation Act, 1981;

Department of Housing and Urban Development —Independent Agencies Appropriation Act, 1981;

Department of the Interior and Related Agencies Appropriation Act, 1981;

Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1981; . . . .

• • •

Sec. 110. Notwithstanding any other provision of this joint resolution except section 102, none of the funds made available by this joint resolution for programs and activities for which appropriations would be available in H.R. 7998, entitled the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1981, as passed the House of Representatives on August 27, 1980, shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported within forty-eight hours to a law enforcement agency or public health service; nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy; *Provided, however,* That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate. . . .

Portions of Pub. L. No. 96-536, 94 Stat. 3166, 3170 (1981):

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any

money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1981, and for other purposes, namely:

Sec. 101. (a)(1) Such amounts as may be necessary for projects or activities (not otherwise specifically provided for in this joint resolution) for which appropriations, funds, or other authority would be available in the following appropriation Acts:

> Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1981; and
>
> Treasury, Postal Service, and General Government Appropriation Act, 1981....

• • •

Sec. 109. Notwithstanding any other provision of this joint resolution except section 102, none of the funds made available by this joint resolution for programs and activities for which appropriations would be available in H.R. 7998, entitled the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1981, as passed the House of Representatives on August 27, 1980, shall be used to perform abortions except where the life of the mother would be endangered if

the fetus were carried to term; or except for such medical procedures necessary for the victims or (sic) rape or incest when such rape has been reported within seventy-two hours to a law enforcement agency or public health service; nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy; *Provided, however,* That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate. . . .

Portions of Pub. L. No. 97-12, 95 Stat. 95, 96 (1981):

Sec. 401. Clause (c) of section 101 and clause (c) of section 102 of the joint resolution of December 16, 1980 (Public Law 96-536), are hereby amended by striking out "June 5, 1981" and inserting in lieu thereof "September 30, 1981".

Sec. 402. Section 109 of such joint resolution is amended to read as follows:

> "Sec. 109. Notwithstanding any other provision of this joint resolution except section 102, none of the funds made available by this joint resolution for programs and activities for which appropriations would be available in H.R. 7998, entitled the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1981, as passed the House of Representatives on August 27, 1980, shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term: *Provided, however,* That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate."

Sec. 403. Such joint resolution is further modified by the provisions included herein under titles I and II of this bill.

---

42 C.F.R. § 431.250:

FFP is available in expenditures for—

(a) Payments for services continued pending a hearing decision:

(b) Payments made—

(1) To carry out hearing decisions; and

(2) For services provided within the scope of the Federal Medicaid program and made under a court order.

(c) Payments made to take corrective action prior to a hearing;

(d) Payments made to extend the benefit of a hearing decision or court order to individuals in the same situation as those directly affected by the decision or order;

(e) Retroactive payments under paragraphs (b), (c), and (d) of this section in accordance with applicable Federal policies on corrective payments; and

(f) Administrative costs incurred by the agency for—

(1) Transportation for the applicant or recipient, his representative, and witnesses to and from the hearing;

(2) Meeting other expenses of the applicant or recipient in connection with the hearing; and

(3) Carrying out the hearing procedures, including expenses of obtaining the additional medical assessment specified in § 431.240 of this subpart.

---

45 C.F.R. § 205.10(b) (October 1, 1979):

(b) *Federal financial participation.* Federal financial participation is available for the following items:

(1) Payments of assistance continued pending a hearing decision.

(2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments.

(3) Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

(4) Administrative costs incurred by the agency for:

(i) Providing transportation for the claimant, his representative and witnesses to and from the place of the hearing;

(ii) Meeting other expenditures incurred by the claimant in connection with the hearing;

(iii) Carrying out the hearing procedures, including expenses of obtaining an additional medical assessment.